

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, <i>et al.</i>)	
)	
Plaintiffs,)	
)	
v.)	Case No. 4:05-cv-00329-GKF-PJC
)	
TYSON FOODS, INC., <i>et al.</i>)	
)	
Defendants.)	

**DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTIONS IN
LIMINE PERTAINING TO ALTERNATE SOURCES OF PHOSPHORUS AND
BACTERIA TO THE IRW [Dkt. No. 2436] AND BACTERIAL OR PHOSPHORUS
LEVELS IN OTHER WATERSHEDS [Dkt. No. 2411]**

EXHIBIT 3
Berton Fisher Deposition Excerpts

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

W. A. DREW EDMONDSON, in his)
capacity as ATTORNEY GENERAL)
OF THE STATE OF OKLAHOMA and)
OKLAHOMA SECRETARY OF THE)
ENVIRONMENT C. MILES TOLBERT,)
in his capacity as the)
TRUSTEE FOR NATURAL RESOURCES)
FOR THE STATE OF OKLAHOMA,)

Plaintiff,)

vs.)

4:05-CV-00329-TCK-SAJ

TYSON FOODS, INC., et al,)

Defendants.)

- - - - -

VOLUME I OF THE VIDEOTAPED
DEPOSITION OF BERTON FISHER, PhD, produced as a
witness on behalf of the Defendants in the above
styled and numbered cause, taken on the 3rd day of
September, 2008, in the City of Tulsa, County of
Tulsa, State of Oklahoma, before me, Lisa A.
Steinmeyer, a Certified Shorthand Reporter, duly
certified under and by virtue of the laws of the
State of Oklahoma.

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918-587-2878

1	A P P E A R A N C E S	1	I N D E X
2		2	
3	FOR THE PLAINTIFFS: Mr. Richard Garren	3	W I T N E S S P A G E
4	Attorney at Law	4	BERTON FISHER, PhD
5	502 West 6th Street	5	Direct Examination by Mr. George 6
6	Tulsa, OK 74119	6	
7	FOR TYSON FOODS: Mr. Robert George	7	Signature Page 325
8	Attorney at Law	8	Reporter's Certificate 326
9	2210 West Oaklawn Drive	9	
10	Springdale, AR 72762	10	
11	FOR CARGILL: Ms. Theresa Hill	11	
12	Attorney at Law	12	
13	100 West 5th Street	13	
14	Suite 400	14	
15	Tulsa, OK 74103	15	
16	FOR SIMMONS FOODS: Mr. John Elrod	16	
17	Attorney at Law	17	
18	211 East Dickson Street	18	
19	Fayetteville, AR 72701	19	
20	FOR PETERSON FARMS: Mr. Scott McDaniel	20	
21	Attorney at Law	21	
22	320 South Boston	22	
23	Suite 700	23	
24	Tulsa, OK 74103	24	
25	FOR GEORGE'S: Mr. Woodson Bassett	25	
	Attorney at Law		
	221 North College		
	Fayetteville, AR 72701		
	FOR CAL-MAINE: Mr. Robert Sanders		
	Attorney at Law		
	2000 AmSouth Plaza		
	P. O. Box 23059		
	Jackson, MS 39225		
	(Via phone)		
	2		4
1	FOR WILLOW BROOK: Ms. Jennifer Griffin	1	(Whereupon, the deposition began at
2	Attorney at Law	2	9:04 a.m.)
3	314 East High Street	3	VIDEOGRAPHER: We are now on the Record for
4	Jefferson City, MO 65109	4	the deposition of Berton Fisher. Today is September
5	(Via phone)	5	3rd, 2008. The time is 9:05 a.m. Would counsel 09:04AM
6		6	please identify themselves for the Record?
7		7	MR. GARREN: Richard Garren for the State
8		8	of Oklahoma.
9		9	MR. GEORGE: Robert George for the Tyson
10		10	defendants. 09:05AM
11		11	MR. McDANIEL: Scott McDaniel for Peterson
12		12	Farms, Inc.
13		13	MR. ELROD: John Elrod for Simmons.
14		14	MR. BASSETT: Woody Bassett for the
15		15	George's defendants. 09:05AM
16		16	MS. HILL: Theresa Hill for Cargill, Inc.,
17		17	and Cargill Turkey Production, LLC.
18		18	VIDEOGRAPHER: And on the phone?
19		19	MS. GRIFFIN: Jennifer Griffin for Willow
20		20	Brook Foods. 09:05AM
21		21	MR. SANDERS: Bob Sanders for the Cal-Maine
22		22	defendants.
23		23	VIDEOGRAPHER: Thank you. The witness may
24		24	be sworn in.
25		25	BERTON FISHER, PhD
	3		5

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<p>1 having first been duly sworn to testify the truth, 2 the whole truth and nothing but the truth, testified 3 as follows: 4 DIRECT EXAMINATION 5 BY MR. GEORGE: 09:05AM 6 Q Dr. Fisher, could you state your full name for 7 the Record, please? 8 A John Berton Fisher. 9 MR. GARREN: And, Robert, may I make the 10 announcement that we had on our pre-going on the 09:05AM 11 Record conversation? 12 MR. GEORGE: You may. 13 MR. GARREN: Dr. Fisher has indicated, as 14 we indicated earlier, in reviewing late yesterday 15 afternoon for this deposition, under Opinion 18, the 09:05AM 16 table and the figure that appear in there, appear at 17 least initially to be possibly containing an error. 18 We haven't yet run that to ground. He's not 19 prepared today to speak to 18. We'll try and get 20 that found or researched tonight. If we can't, then 09:06AM 21 we'll bring him back for Opinion 18 at a later time. 22 Secondly, we gave you a temporary copy of a 23 field workbook that was prepared by Dr. Fisher this 24 weekend in anticipation of his deposition and his 25 actually going to the edge of field sites and 09:06AM</p> <p style="text-align: center;">6</p>	<p>1 this case; is that correct? 2 A Yes. 3 Q Okay, and you've issued your second report in 4 this case; is that correct? 5 A Yes. 09:07AM 6 Q Okay. Let me hand you what we've marked as 7 Exhibit 1 to your deposition, Dr. Fisher, and ask 8 you whether you can identify that as a true and 9 correct copy of your expert report containing 10 your -- the opinions that you intend to offer at the 09:07AM 11 trial of this matter if you are permitted to 12 testify. 13 A Okay. This is a true and correct copy of the 14 report. The only reservation is with respect to 15 Opinion 18, there may be some -- there are some 09:08AM 16 errata that need to be dealt with. 17 Q With the exception of the issue with regard to 18 Opinion 18, do you believe the opinions that are set 19 forth in Exhibit No. 1 to reflect the full nature of 20 the opinions that you intend to offer if you are 09:08AM 21 permitted to testify at the trial of this matter? 22 A Barring the review of additional data, yeah. 23 Q Okay. Can you turn to Opinion 18, and at 24 least for clarity of the Record, read the opinion 25 that we've been referring to that may contain a 09:08AM</p> <p style="text-align: center;">8</p>
<p>1 reviewing those sites and making some notes and 2 taking pictures. So they will be -- that book will 3 be properly processed and sent to you as all other 4 documents have been. So when you receive it, you'll 5 need to probably throw away the temporary copy we 09:06AM 6 brought to you today. 7 Who made the announcement today or who else 8 joined? Who joined on the phone? 9 MR. REDEMANN: It was Bob Redemann. I'm 10 just listening in today. 09:07AM 11 MR. GEORGE: Thank you. Rick, I do want to 12 make sure the Record is clear that the defendants 13 are not -- we appreciate the disclosure regarding 14 the possible error in Opinion 18, but we're not 15 conceding that Dr. Fisher has the right or the 09:07AM 16 ability to amend his opinion, particularly at this 17 late juncture. 18 MR. GARREN: We don't anticipate there will 19 be an amendment of opinion. We just think there 20 will be some errata with regard to some calculation. 09:07AM 21 We think it's a paste and cut error, moving from an 22 Access or an Excel table or some other similar type 23 of process. 24 MR. GEORGE: Okay. 25 Q Dr. Fisher, this is your second deposition in 09:07AM</p> <p style="text-align: center;">7</p>	<p>1 possible error? 2 A Yes. Okay. The opinion itself I do not 3 believe contains an error, but there may be an error 4 in the graph and/or table that is presented in 5 support of that, that being Table 12 and/or Figure 09:09AM 6 8. The opinion itself, Opinion 18, begins on Page 7 39, and the opinion itself reads, the chemical 8 composition of poultry waste is distinctly different 9 from the chemical composition of cattle waste and 10 wastewater treatment plant effluent. 09:09AM 11 Q And Table 12 where you think there may be an 12 error, could you describe for the Record what that 13 table was intended to show? 14 A The table is intended to show some statistical 15 information concerning maximums, minimums, means, 09:09AM 16 medians, first and third quartile values for the 17 ratios of total zinc to total phosphorus, total 18 copper to total phosphorus, total arsenic to total 19 phosphorus and total zinc to total copper. 20 Q And does the statistical analysis and data 09:10AM 21 reflected in Table 12 support or was it intended to 22 support the opinion that you offer as Opinion 18 23 regarding the differences between the chemical 24 composition of poultry litter, cattle waste and 25 wastewater treatment effluent? 09:10AM</p> <p style="text-align: center;">9</p>

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<p>1 question at all and, I'm sorry, Mr. George.</p> <p>2 Q That's okay.</p> <p>3 A Let's see -- let's try to back that up.</p> <p>4 Q Sure. Other than land application, which</p> <p>5 we've discussed, and you indicated that your 10:52AM</p> <p>6 knowledge would be limited to the records from</p> <p>7 nutrient management plans. Okay?</p> <p>8 MR. GARREN: Object to form.</p> <p>9 Q Are there any other practices of the</p> <p>10 integrators, as opposed to contract growers, that 10:52AM</p> <p>11 you believe have caused the pollution of surface</p> <p>12 water, groundwater, soil or sediment?</p> <p>13 A Now I'm confused. The first question was</p> <p>14 whether or not I had knowledge of specific farms</p> <p>15 that were specific operations run and controlled and 10:52AM</p> <p>16 owned by an integrator where waste had been</p> <p>17 disposed. That was the first issue. I think the</p> <p>18 original question was kind of different from that,</p> <p>19 from what you just asked. You asked what actions</p> <p>20 the integrators have taken that have resulted in 10:53AM</p> <p>21 disposal of waste.</p> <p>22 Q Well, no.</p> <p>23 A That's not what you've asked. I'm sorry.</p> <p>24 Q I've asked for the basis for your Opinion No.</p> <p>25 1, which is the actions of the integrators and the 10:53AM</p> <p style="text-align: center;">78</p>	<p>1 poultry farmer who contracts with Tyson or</p> <p>2 Cobb-Vantress for which you can show runoff of</p> <p>3 poultry litter into a stream, river or lake?</p> <p>4 A I believe we can with respect to the edge of</p> <p>5 field work that was conducted in which we were able 10:55AM</p> <p>6 to identify specific origins of waste and specific</p> <p>7 locations of waste, such that we could achieve or</p> <p>8 collect an edge of field sample from that locality</p> <p>9 because that shows runoff that's heading into a</p> <p>10 drainage and going on into a stream and once it's in 10:55AM</p> <p>11 the stream, it heads on into the lake, so there are</p> <p>12 those instances. I've not -- I can't sit here and</p> <p>13 tell you it's Joe Blow from this farm right today.</p> <p>14 Q As you sit here today, you cannot identify a</p> <p>15 single poultry farmer who contracts with Tyson or 10:56AM</p> <p>16 Cobb-Vantress for which you can show runoff into a</p> <p>17 stream, river or lake; correct?</p> <p>18 A The data is in my records.</p> <p>19 Q Can you go ahead and answer my question? As</p> <p>20 you sit here today, you can't identify such a 10:56AM</p> <p>21 grower?</p> <p>22 A As I sit here today, I can't recall the</p> <p>23 identity of such a grower.</p> <p>24 Q If I were to ask that same question for each</p> <p>25 of the other poultry companies that are named as 10:56AM</p> <p style="text-align: center;">80</p>
<p>1 practices of the integrators that have polluted the</p> <p>2 surface water, groundwater, soil and sediment in the</p> <p>3 Illinois River watershed.</p> <p>4 A Okay. The integrators have concentrated</p> <p>5 poultry production operations within portions of the 10:53AM</p> <p>6 Illinois River watershed. That concentration of</p> <p>7 operations combined with distancing themselves from</p> <p>8 the waste has resulted in the waste being disposed</p> <p>9 close by the farms and within the Illinois River</p> <p>10 watershed. 10:54AM</p> <p>11 Q Can you give me -- other than the business</p> <p>12 model, which you seem to be talking about the</p> <p>13 business model, can you give me any specific acts of</p> <p>14 the integrators that have caused pollution of</p> <p>15 surface water, groundwater, soil and sediment? 10:54AM</p> <p>16 A The specific act is the business model.</p> <p>17 Q That's the entire basis for your Opinion No.</p> <p>18 1?</p> <p>19 A There are a tremendous number of poultry grown</p> <p>20 here. It is -- it has been considered costly to 10:54AM</p> <p>21 dispose of the waste over a broad area, and so it's</p> <p>22 disposed of in a small area. That's the basis in</p> <p>23 terms of defendants' actions.</p> <p>24 Q Let's talk about contract growers for a</p> <p>25 moment, Dr. Fisher. Can you identify a single 10:55AM</p> <p style="text-align: center;">79</p>	<p>1 defendants in this lawsuit, would the answer be the</p> <p>2 same?</p> <p>3 MR. GARREN: Object to form.</p> <p>4 A I'm not sure. I think it might not be the</p> <p>5 same with respect to Peterson, and that's simply 10:56AM</p> <p>6 because there's a photograph that's produced in my</p> <p>7 reports showing waste disposal that is associated</p> <p>8 with a specific Peterson grower.</p> <p>9 Q Does your photograph show runoff from that</p> <p>10 particular location into a stream, river or lake? 10:57AM</p> <p>11 A The photograph does not but -- and I need to</p> <p>12 look at the information, but there may well be other</p> <p>13 data that does.</p> <p>14 Q What would that other data be?</p> <p>15 A If it exists -- I'll have to look to see if it 10:57AM</p> <p>16 does -- it would be edge of field information.</p> <p>17 Q Was there an edge of field sample collected at</p> <p>18 the location described in -- I believe you are</p> <p>19 referring to the photograph in Figure 3 of your</p> <p>20 report? 10:57AM</p> <p>21 A That's correct. I don't know. I'd have to</p> <p>22 review that because the nomenclature here is</p> <p>23 different. I'll have to look at the specific</p> <p>24 location. I've not done that specifically here.</p> <p>25 That would be work I would intend to do, by the way, 10:57AM</p> <p style="text-align: center;">81</p>

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<p>1 would be to clean up some of the specifics.</p> <p>2 Q Work you would intend to do?</p> <p>3 A Yeah. The data already exists, but when you</p> <p>4 ask me can I associate individual integrators or</p> <p>5 contract growers, associate with individual 10:58AM</p> <p>6 integrators and runoff, then I would intend to do</p> <p>7 that work. That data is existing.</p> <p>8 Q Let's close the loop on this line of</p> <p>9 questioning, if I can. With the exception of your</p> <p>10 comment about the photograph in Figure No. 3, can 10:58AM</p> <p>11 you identify a single poultry farmer who contracts</p> <p>12 with any of the other integrators named in this</p> <p>13 lawsuit that would show runoff of poultry litter</p> <p>14 into a stream, river or lake?</p> <p>15 MR. GARREN: Object to form. 10:58AM</p> <p>16 A Okay. Not without review of my base data, not</p> <p>17 as I sit here today.</p> <p>18 Q Okay, and the way you would make that showing</p> <p>19 would be to review edge of field samples; do I</p> <p>20 understand that correctly? 10:58AM</p> <p>21 A No, not completely.</p> <p>22 Q Okay. Well, tell me how you would go about</p> <p>23 that.</p> <p>24 A With respect to individual farms, the most</p> <p>25 specific information is to review the investigator 10:59AM</p> <p style="text-align: center;">82</p>	<p>1 been applied to a stream or the lake?</p> <p>2 A In the sense of doing a causation pathway</p> <p>3 analysis as Roger Olsen has done, yes. In terms of</p> <p>4 looking at a single field all the way to a stream or</p> <p>5 lake, no. 11:00AM</p> <p>6 Q Okay. Now, with respect to edge of field</p> <p>7 samples, you'll agree with me that the mere fact</p> <p>8 that a constituent has run off of a pasture and been</p> <p>9 collected in an edge of field sample does not</p> <p>10 guarantee that that constituent reaches a stream, 11:00AM</p> <p>11 the Illinois River or Lake Tenkiller; correct?</p> <p>12 A It says that constituent is on its way in that</p> <p>13 direction.</p> <p>14 Q Do they all get there?</p> <p>15 A They all get there eventually. 11:01AM</p> <p>16 Q They all get there? Everything that runs off</p> <p>17 the edge of the field eventually makes its way to</p> <p>18 Lake Tenkiller; is that your opinion?</p> <p>19 A I would say that everything that runs off the</p> <p>20 edge of a field ultimately gets into drainage 11:01AM</p> <p>21 because it --</p> <p>22 Q My question --</p> <p>23 A There's some fraction that does.</p> <p>24 Q Some fraction from every field or some</p> <p>25 fraction from all of the fields? 11:01AM</p> <p style="text-align: center;">84</p>
<p>1 data to find those locations where there was a known</p> <p>2 specific origin for poultry waste that was disposed,</p> <p>3 that is, the poultry waste was tracked from its</p> <p>4 point of origin to its point of land disposal, and</p> <p>5 then cross correlate that with the edge of field 10:59AM</p> <p>6 samples and look at the edge of field samples in</p> <p>7 relationship to named streams, for example, or even</p> <p>8 unnamed streams, how does that relate to the</p> <p>9 drainage pattern within the area, but bottom line is</p> <p>10 it's going to be investigator data, edge of field 10:59AM</p> <p>11 samples would be the clearest path.</p> <p>12 Q As you sit here today, Dr. Fisher, you've not</p> <p>13 undertaken that analysis, have you, to track runoff</p> <p>14 from poultry litter from a particular site to a</p> <p>15 stream to the lake; correct? 10:59AM</p> <p>16 MR. GARREN: Object to form.</p> <p>17 Q Have you done that?</p> <p>18 A Well, I certainly have collected the data to</p> <p>19 do that.</p> <p>20 Q Well, my question is whether you have 11:00AM</p> <p>21 completed that analysis.</p> <p>22 A I have not completed that analysis.</p> <p>23 Q Okay. Has any expert to your knowledge</p> <p>24 undertaken that analysis to actually track runoff</p> <p>25 from the edge of field location where litter has 11:00AM</p> <p style="text-align: center;">83</p>	<p>1 A What's the difference between some fraction</p> <p>2 from every field and some fraction from all the</p> <p>3 fields?</p> <p>4 Q Well, the difference is between which a</p> <p>5 particular contract grower's actions are 11:01AM</p> <p>6 contributing or not.</p> <p>7 MR. GARREN: Object to form.</p> <p>8 A Some fraction of all runoff in my opinion</p> <p>9 would make it into the drainageways and into Lake</p> <p>10 Tenkiller. 11:01AM</p> <p>11 Q What have you done to test that opinion?</p> <p>12 A We certainly see that there are waste as you</p> <p>13 see the chain -- the pathway analysis. You see that</p> <p>14 material is disposed in fields. You see that edge</p> <p>15 of field samples contain high concentrations of 11:02AM</p> <p>16 phosphorus and certain metals that are indicative of</p> <p>17 poultry waste. You see that those materials are</p> <p>18 also in stream sediments. You see that the</p> <p>19 phosphorus numbers are going into Lake Tenkiller and</p> <p>20 you see an association between, for example, chicken 11:02AM</p> <p>21 house density and phosphorus in high flow samples.</p> <p>22 I think that the -- that that analysis is pretty</p> <p>23 conclusive that material that was put on the ground</p> <p>24 as poultry waste ends up in Lake Tenkiller. Now, if</p> <p>25 you look at any individual field, if any material 11:02AM</p> <p style="text-align: center;">85</p>

<p>1 escapes from that field into a drainageway, then 2 it's on its way to Lake Tenkiller at some point. 3 Q But you've not done anything to test your 4 theory that all edge of field runoff makes it to a 5 stream, river or lake with respect to a specific 6 field; is that correct? 11:03AM 7 A With respect to a specific field, no, but I 8 just hasten to add when it rains, the rivers seem to 9 rise and the ditches seem to be filled and waste is 10 running off fields. I'm not sure how I see that 11:03AM 11 doing it from any given field is significant in that 12 regard. 13 Q So since it's not significant, you didn't 14 undertake that analysis; is that right? 15 MR. GARREN: Object to form. 11:03AM 16 A Trying to -- I don't think there's any purpose 17 in looking at an individual field. 18 Q Okay. Can you identify a single poultry 19 farmer who contracts with Tyson or Cobb-Vantress for 20 which you can show that surface applications of 11:03AM 21 poultry litter have traveled through the soil and 22 contaminated groundwater in the Illinois River 23 watershed? 24 A I can't give you a name today. 25 Q If I ask that same question with respect to 11:03AM 86</p>	<p>1 sit here today, give you a name or a specific 2 location where that has happened. Clearly, though, 3 it has happened. 4 Q How would you go about determining the answer 5 to that question if you can't provide it today; what 11:04AM 6 information would you consult? 7 MR. GARREN: Object to form. 8 A From a specific location? 9 Q Yes, sir. 10 A Gosh, you could do an experiment. You could 11:05AM 11 place tracer materials on the ground of some type, 12 probably a chemical tracer, and trace that chemistry 13 into drainage and groundwater and surface water in 14 the lake, which in effect for the whole watershed 15 has been done because the poultry waste is in fact a 11:05AM 16 tracer, but with respect to an individual field, 17 you'd have to do that at every field. 18 Q Have you undertaken any such experiments in 19 the Illinois River watershed? 20 A No, and, in fact, no one in their right mind 11:05AM 21 would attempt to undertake that experiment. 22 Q Why not? 23 A That would cost an enormous sum of money. 24 Q With respect to a particular field would cost 25 an enormous sum of money? 11:05AM 88</p>
<p>1 the other integrators named as defendants in this 2 case, would I get the same answer? 3 A Yes, you would. 4 MR. GARREN: Object to form. 5 MR. McDANIEL: The objection was over the 11:04AM 6 answer. Restate your answer, if you would, please. 7 MR. GARREN: It's in the Record. 8 MR. McDANIEL: You spoke over it for 9 purposes of the video. That's all. 10 MR. GARREN: It's in the Record. 11:04AM 11 MR. McDANIEL: Restate your answer. 12 A So can I do -- let's be sure that we're real 13 clear. 14 Q You want me to ask it again? 15 A Yes, please. I'm sorry. 11:04AM 16 Q If I ask the same question with regard to your 17 ability to identify poultry farmers who contract 18 with the other integrators named as defendants in 19 this case for which you can show that surface 20 application of poultry litter have traveled through 11:04AM 21 the soil and contaminated groundwater in the 22 Illinois River watershed, would your answer be the 23 same? 24 MR. GARREN: Object to form. 25 A My answer would be the same. I can't, as I 11:04AM 87</p>	<p>1 A Well, it would cost a lot of money to do it at 2 a particular field. You'd also have to have the 3 full cooperation of the landowner and possibly of 4 adjacent landowners. 5 Q When you say an enormous sum of money, are you 11:06AM 6 talking about a number higher than 18 million 7 dollars? 8 A No, no. 9 Q It would be cheaper than that, wouldn't it? 10 A We would hope so, yeah. 11:06AM 11 Q Okay. 12 A But I think you're probably talking about 13 something that's on the order of 2 to 4 million. 14 Q Is that an unreasonable expenditure for this 15 case in your view? 11:06AM 16 MR. GARREN: Object to form. 17 A I don't know. I can't give an opinion as to 18 that. 19 Q Turn to Page 9 of your report. In the first 20 full paragraph, the last sentence of that paragraph, 11:07AM 21 you state that these constituents would not be 22 present as contaminants in soil, edge of field 23 runoff, surface water and streams and in Lake 24 Tenkiller, groundwater stream sediments and lake 25 sediments, except for the actions and practices of 11:07AM 89</p>